Environment and Public Works Committee Hearing
Strengthening Public Health Protections by Addressing Toxic Chemical Threats
July 31, 2013

Follow-up Questions for Written Submission
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Questions from Senator Barbara Boxer

1. **What types of economic and pollution reduction benefits have Washington States' pollution prevention programs provided?**

   Response: The Washington State legislature established our pollution prevention (P2) program over 25 years ago with the goal to eliminate or reduce hazardous waste and hazardous substances at the source. Certain businesses that use hazardous products or generate hazardous waste are required to prepare plans for voluntarily reducing these potential sources of pollution.

   Washington State businesses report that Washington State Department of Ecology (Ecology) pollution prevention programs and services have created more than $56 million in business value for them since 2005. That $56 million would pay for 1,100 jobs based on an average Washington State wage of approximately $50,000, as compiled by the Bureau of Labor Statistics, U.S. Department of Labor.

   Additional savings have occurred through other prevention programs such as our energy audits which have saved over $2.7 million for approximately 40 businesses involved, our engineering efficiency program, which has documented a savings of over $3 million for approximately 35 businesses helped, and ten businesses saved over $2.1 million through our Lean and Green efforts. These three efforts provide value despite the small amount of state resources used.

   With Ecology's help, these businesses found ways to eliminate 61 percent (approximately 183 million pounds) of Washington's total annual hazardous waste during the 22 years of P2 planning.

   Reducing the volume of hazardous substances used in commerce is important because the risk from toxic chemicals doesn't begin with a leaking drum at an industrial site; it begins when toxic chemicals are used to make products or deliver services. Safe hazardous waste management is essential to protecting human health and the environment, but avoiding the use of toxic chemicals in the first place is the smartest, cheapest, and healthiest approach.

Over 20 states have established pollution prevention programs similar to Washington State that are providing similar results. This network of state programs provides a good framework to support federal pollution prevention policies. They are a good resource for business technical assistance.

Pollution prevention means reducing or eliminating the use and toxicity of hazardous substances and hazardous wastes at the source, before they are generated. Prevention is source reduction through toxic chemical substitution, process improvements and other practices, and reducing or eliminating the creation of pollutants through increased efficiency in the use of raw materials, energy, water, or other resources.

However, despite all the successes of the pollution prevention programs, there is still work to be done. One of key challenges is related to increasing concerns associated with chemicals of concern. Traditional management and control programs are not effective in controlling these sources of contamination that are often found in people, our homes, and the environment. Given the successes of pollution prevention efforts, we should ensure that Toxic Substances Control Act (TSCA) reform includes a strong prevention-based ethic to address the most problematic chemicals in commerce while encouraging innovation and green chemistry.

2. **What were Washington's main health concerns with persistent, bioaccumulative and toxic chemicals (PBTs) building up in our food chain and bodies and how did the state's regulations seek to protect people from these threats?**

<u>Response:</u> While Washington has made progress in protecting people from PBTs, there is much we don't know about what PBTs are in use in which products, where they end up, and their health effects.

Washington State is an example of why states' action is necessary to address toxic chemicals in situations where the federal government, for whatever reason, does not.

The U.S. Environmental Protection Agency (EPA) should prioritize PBTs for screening and action in the reformed TSCA.

PBTs have a wide range of health effects for people and the environment. What distinguishes PBTs from other toxic chemicals is their persistence in the environment and their bioaccumulation in the food chain. This means that even small releases have the potential to result in high enough levels to cause harm. In addition, once PBTs are in the environment it takes a long time for the concentrations to decrease,

making prevention more important. Because PBTs remain in the environment and people for long periods of time and easily transfer among different media, Washington decided to address PBTs across different media instead of relying on single medium approaches.

In our 2000 Strategy to reduce PBTs, we mentioned a wide range of toxic effects including effects on the nervous system, reproductive and developmental problems, immune-response suppression, cancer, and endocrine disruption. Washington is also particularly concerned with exposures during early childhood that have more potential to affect the development of the brain and other organs. In 2000, Washington started with a list of 9 candidate PBTs that had 15 local fish consumption advisories, 2 statewide fish consumption advisories, and 244 water segments that exceeded surface water quality criteria. These chemicals included DDT, dioxin, Mercury, and PCBs, which have a range of adverse health effects. The 2006 administrative rule on PBTs updated this initial list to include a total of 27 chemicals and groups of chemicals with a wide range of health concerns.

One specific example of what we have done to protect people and wildlife from PBTs is writing and implementing the chemical action plan (CAP) for polybrominated diphenyl ethers (PBDEs). The PBDE CAP found PBDEs are used in a variety of consumer products, they are detected in people and the environment at increasing levels, and there are potential impacts to neurodevelopment. The CAP recommended a ban, and the state legislature subsequently banned the use of PBDEs for specific applications where we knew there was a safer alternative.

Another example is from the Lead CAP, which found that the largest single source of lead exposure to children is old lead-based paint that is still in homes from before the federal ban. While we have implemented some of the recommendations in the Lead CAP, we have not been able to fully address this important source by assessing older housing for lead hazards and remediating where indicated. This work has been hampered by the lack of funding and cuts in federal funding for Centers for Disease Control, Prevention Healthy Homes and Lead Poisoning Prevention programs, and Housing and Urban Development, Office of Healthy Homes and Lead Hazard Control programs.

3. Should TSCA reform legislation require an established number of chemical safety assessments over a set period of time?

<u>Response:</u> Yes, the legislation should provide an expectation regarding the annual number of chemical safety assessments that should be conducted by the

EPA, and ensure available resources.

As part of the prioritization process, EPA should identify at least 50 PBTs for expedited action at the earliest opportunity. EPA should move aggressively toward risk reduction measures and restrictions for this class of chemicals.

EPA should be provided adequate financial and staffing resources to accelerate and sustain the chemical safety assessment process. This system should be funded by a fee-based or cost-recovery system paid by the chemical manufacturer to the EPA. Fees could be based on toxicity and volume. EPA could create incentives to encourage green chemistry safety assessments for innovative chemistries.

EPA should consult and partner with the states in establishing the number of chemical safety assessments. EPA should publish the anticipated schedule on a regular basis.

The number of safety assessments should be prioritized based on the chemical prioritization framework. States should be able to conduct safety assessments if EPA fails to meet schedules on a timely basis.

4. **Should TSCA reform legislation explicitly require chemical safety assessments to consider the unique vulnerabilities of pregnant women, infants, children, and other vulnerable populations when assessing and addressing toxic chemicals?**

   <u>Response</u>: Yes, the legislation should consider the most vulnerable of our population as a prevention-based approach to public health concerns. We understand this is the intent of the authors of the legislation, but it should be clarified.

5. **Should TSCA reform legislation require EPA to collect information on safer alternatives to dangerous chemicals and adopt tools to promote the use of these safer alternatives?**

   <u>Response:</u> Yes, while safer chemical alternative assessments are not the only tool for advancing chemical regulation, they do play a vital role, aiding in the transition to safer chemistries.

   Manufacturers of chemicals that do not meet the safety standards should be required to conduct safer alternative assessments in accordance with guidance from EPA. These assessments should be publicly available on an EPA website.

EPA should also provide states and industry with technical assistance services, grant funding, and tools to facilitate the move towards safer alternatives.

Questions from Senator David Vitter

1. **If TSCA is modernized to require EPA to screen and prioritize all chemicals in commerce, taking input from states like Washington, and to conduct comprehensive safety assessment on high priority chemicals, will the state of Washington need to do its own assessments of chemicals? Please explain your answer.**

   Response: Yes, it is likely that there will be a continued need for Washington State to perform its own assessments of some chemicals, and preservation of the State's authority to do so is essential. Even under a robust reformed TSCA, it will be many, many years before EPA is able to complete assessments on the tens of thousands of existing chemicals in commerce. EPA's priorities may not always coincide with those of Washington State.

   For example, Washington State is particularly concerned with sources of copper and other metals that are impacting the health of salmon in the Puget Sound region. We also have another regional issue related to source of PCB contamination in the Spokane River, including toxics loading resulting from pigments that contain PCBs which are ending up in the river.

   Having the authority to conduct our own assessments is an important regulatory tool for the states.

   Under the provisions of S. 1009 as introduced, chemicals categorized as "low priority" would not be subject to further assessment by EPA. There may be instances in which: (1) Washington State does not concur with EPA's assessment of a particular chemical as "low priority;" or (2) circumstances unique to Washington warrant action at the state level in the absence of federal action.

   Well crafted TSCA reforms that are effective will provide the states with greater accountability and confidence in the federal system. A federal system that works will allow states to redirect resources to other priorities and is more cost effective to tax payers. If TSCA reform is not effective, states will be compelled to act.

2. **If TSCA is modernized in a strong and transparent way at the federal level, is some level of preemption acceptable in your view?**

   Response: State action should be preempted only where compliance with both a state and federal law would be impossible. As a practical matter, implementation of a comprehensively reformed TSCA will render the state preemption issue largely moot, as states will focus their increasingly limited resources on other priorities. During the past 20 years, however, states have acted to fill the regulatory void at the federal level, illustrating the vitally important role states play in providing a "backstop" to federal inaction and as laboratories of innovation.

   States' action is a necessary right to address our regional and local concerns that have high importance to our citizenry, but do not have the same level of visibility when viewed from a national perspective. In Washington State, our state legislature has been responsive to these issues based on concerns expressed by constituents, and is able to respond in a timely manner.

3. **Do you view provisions in the CSIA allowing the federal government to share confidential business information with states as an improvement in current law?**

   Response: Yes, provisions authorizing EPA to share Confidential Business Information (CBI) with the states is an important improvement on the current law. As explained in the detailed comments appended to my testimony before the Committee, however, Washington State strongly recommends amendments to the existing CSIA provisions to ensure EPA's ability to share CBI with all states.

4. **Do you believe that the State of Washington would benefit from an updated federal chemical management law? Is the State negatively impacted by the current federal system?**

   Response: Yes, there has been general agreement from most parties that Washington State, as well as other states, would benefit from an updated federal chemical management law. It's been our experience that Washington State has been negatively impacted by the failures of the current system. This has resulted in chemical contamination, including expensive toxic cleanup sites and impacts on the state's water quality permitting program which significantly impacts our businesses. There are also related concerns to potential public health impacts.

5. **If strong deadlines were inserted into the CSIA, do you believe it will create a more credible system that will allow Washington to benefit from more federal action? Would strong deadlines help ease any concerns surrounding preemption? Where do you believe deadlines are need in the CSIA?**

   Response: Yes, the inclusion of deadlines for EPA action would clearly strengthen S. 1009. Enforceable deadlines are important for the successful implementation of any environmental regulatory statute. At a minimum, TSCA would benefit from the establishment of deadlines for decisions on prioritization, assessment, and whether to require additional testing. While incorporation of appropriate deadlines for EPA action would address an important flaw in the current bill, compliance with such deadlines is dependent on the availability of adequate resources and other factors that are not entirely within EPA's control. As we know from many years of practical experience with implementation of federal environmental statutes, simple inclusion of regulatory deadlines does not guarantee timely action. For these reasons and those explained above, inclusion of regulatory deadlines would not alter Washington's position on the need for preservation of state chemicals management authority.

6. **Current TSCA has a preemption provision which says that following a rule or order by the Administrator under sections 5 or 6, "no State or political subdivision of a State may, after the effective date of such requirement, establish or continue in effect, any requirement which is applicable to such substance or mixture."**

   a. **How do you and the State of Washington read the word "requirement" in current TSCA preemption? Has the use of that word precluded any state tort claims or causes of action in Washington that you are aware of?**

      Response: By its plain language and common usage, the term "any requirement" suggests a very broad application of the preemptive effect.

      With regard to the impact of the current TSCA on the exercise of Washington State or common law authority, b*ecause EPA has acted on so few chemicals under TSCA, preemption of state authority has not been an issue under the current law. We are not aware of any instance in which the scope of this preemptive language has been addressed by the courts in regards to its possible effect on tort claims or causes of action in Washington, or for that matter, on state statutes or agency rules.*

      The term "requirement" could be broadly interpreted to include statutory mandates, regulations, consent agreements, court ordered actions, or other legal actions.

b. In TSCA's preemption provision, there is an exception for requirements "adopted under the authority of the Clean Air Act or any other Federal law." Do you read that as similar to the provision in the CSIA which exempts requirements, prohibitions, or restrictions "adopted under the authority of any other Federal law" from the bill's preemption language? Has current TSCA in any way hindered Washington's abilities to use authority under the Clean Air Act or any other Federal laws?

Response: The text of both provisions is similar. Both existing TSCA and the CSIA provide for the similar provision as described in the question. As noted above, b*ecause TSCA is structurally flawed and EPA has acted on so few chemicals under TSCA, preemption of state authority has not been addressed or tested in any significant or meaningful way under the current law.*

However, I do have concerns related to new provisions in CSIA preemption section that appears more restrictive and would possibly limit state actions. The CSIA proposed language under Section 18(c)(3)(A) includes a new criteria that would place a burden on the states to prove that any state action "does not impose a restriction on the manufacture, processing, or distribution in commerce, or use of a chemical substance."

For example, the Washington State legislature enacted a ban on coal tar sealants which could be preempted under the CISA language, since this is a product that would include chemical substances that were "manufactured, distributed or used" in our state. My interpretation is that CSIA would not allow the state to enforce our current ban on pavement sealants.